(1)

91-1407

No. 91-_____

Supreme Court, U.S.
FILED
JAN 30 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WHITE BUFFALO CONSTRUCTION INC.,

Petitioner,

v.

J. ARLIE BRYANT, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. When a federal court is ruling on contract issues in a diversity case, does state law govern interpretation and construction of contract terms?

2. Did the Ninth Circuit overlook findings that were unquestionably and irrefutably erroneous?

LIST OF INTERESTED PARTIES

1. White Buffalo Construction, Inc.[1]
2. Transamerica Insurance Company[2]
3. J. Arlie Bryant, Inc.

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[1] *There are no parent or subsidiary companies.*

[2] *The bonding company for White Buffalo Construction, Inc. but not a party in this action.*

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PETITION FOR WRIT OF CERTIORARI

Petitioner White Buffalo Construction, Inc. (hereafter "White Buffalo") respectfully prays that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and reverse its judgment.

OPINIONS BELOW

The court of appeals' opinion is not published but the result is reported as a Table Case in 935 F.2d 277 (Ninth Cir. 1991). It is attached as Appendix B. The district court's findings of fact and conclusions of law are not reported and are attached as Appendix F.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision. 28 U.S.C. § 1254(1).

The memorandum and judgment of the Ninth Circuit were entered on June 13,

1991 (App B & C). Rehearing was denied on September 27, 1991 (App A).

An Order for a extension of time for filing a petition for a writ of certiorari was granted on February 1, 1992 by Justice O'Connor (App E). The time for filing was extended to and including February 1, 1992.

STATUTES INVOLVED

ORS 42.220 Consideration of circumstances.

"In construing an instrument, the circumstances under which it was made, including the situation of the subject and of the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting."

STATEMENT OF THE CASE

Plaintiff/subcontractor J. Arlie Bryant, Inc. (hereafter "Bryant") brought this action under the Miller Act, 40 USC §270(a) against defendant/contractor White

Buffalo and its bonding company, Transamerica Insurance Company, for non-payment for labor and materials furnished in connection with Bureau of Indian Affairs Project No. YIR 1104. Defendant filed an answer, affirmative defense and a counterclaim alleging that plaintiff breached the parties' subcontract, claiming backcharges in an amount in excess of $30,000.

On October 15, 1990, the parties appeared before the U.S. District Court for the Eastern District of Washington for a bench trial. Rather than proceeding to a full trial, however, the district court restricted the testimony to the "threshold" issue of the proper interpretation of the contract. (Tr. 77.) In this regard, the district court heard limited testimony from Luther Clevenger, President of White Buffalo.

After receiving the testimony of Mr.

Clevenger, the district court concluded that it need not consider the parties' factual contentions and entered judgment for plaintiff as a matter of law. (Tr. 80, 84-86.)[3] Specifically, the district court held that the parties' subcontract unambiguously allowed plaintiff "approximately two and one-half months" to complete its contractual obligations and that there was no genuine issue of material fact as to whether plaintiff did so. In the alternative, the district court held that if "two and one-half months" is ambiguous, it must be construed against the defendant. (Tr. 81.)

Further, the district court held that the contract unambiguously allowed plaintiff to cancel its $3,000,000

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[3] *Although the district court held that it would hear testimony concerning defendant's claim that it incurred $247.50 for testing the quality of the crushed rock and the appropriate date from which interest should accrue on the back charges, those issues were resolved by the parties. (See Tr. 21, 85-88; see also Findings of Fact and Conclusions of Law, 6 (July 30, 1990).)*

insurance coverage upon completing its work under the contract. (Tr. 83.) Consequently, the district court held that no genuine issue of fact was raised by plaintiff's cancellation of $2,000,000 of its insurance coverage in late February, 1987. In so holding, the district court concluded that the fact that plaintiff hired an individual to return to the project site in late March and early April to remove logs was irrelevant to the insurance issue. (Tr. 83-84.) In the alternative, the district court held that if the subcontract was ambiguous, it must be construed against defendant. (Tr. 84.) The Ninth Circuit subsequently affirmed through a memorandum decision in which it treated the district court's contract interpretation as a fact and consequently reviewed only for clear error and not de novo. (App. B).

REASONS FOR ALLOWING THE WRIT

The Ninth Circuit did not apply the correct standard of review to the contract rulings made by the District Court in this diversity case. The Court treated the trial court's contract interpretation as a factual determination and therefore reviewed the determinations made below only to see if they were "clearly erroneous." This was an error. Consistent with the practice in other federal circuits and applying state (Oregon) law the Ninth Circuit should have reviewed the contract interpretations de novo and, having done that, reversed.

The sum and substance of this Court's reasoning appears in the following language:

> "Because the District Court relied on extrinsic evidence in interpreting the subcontract agreement, 'its interpretation of the contract will not be reversed unless it is clearly erroneous.' In re United States Fin Sec Litig, 729 F2d

2628, 632 (9th Cir 1983). (App 5)

> "The District Court's interpretation of the contract was not clearly erroneous." (App 5)

We respectfully submit that the Court's review is erroneous and flawed for two reasons.

First, the undisputed evidence is that Bryant, not White Buffalo authored the insurance provision. (App Br 30-31; Reply Br 11.) Consequently, the trial court's finding that White Buffalo was the author is unquestionably and irrefutably erroneous.

Second, the Court should have followed state (Oregon) law and construed the contract de novo and should not have applied the federal "clearly erroneous" fact standard to the contract interpretation. Other federal circuits recognize that in diversity cases interpretation and construction of contracts is governed by state law. See,

e.g., Cloud v. Trustees of Boston University, 720 F2d 721, 724 (1st Cir 1981): Lockette v. Greyhound Lines, Inc., 817 F2d 1182, 1185 (5th Cir 1987): Madsen v. Prudential Federal Sav. & Loan Ass'n, 635 F2d 797, 802 (10th Cir 1980): Vernon v. Resolution Trust Corp., 907 F2d 1101, 1109 (11th Cir 1990). The Ninth Circuit itself has even held that state and not federal law controls issues of contract interpretation in a diversity case. In re Aslan, 909 F2d 367, 369 (9th Cir 1990). Finally, this Court too recognizes that state, not federal, law ordinarily governs contract issues. United States v Yazell, 382 US 341, 86 S Ct 500, 15 L.Ed.2d 404 (1966).

Here, the parties agreed that their contract would be governed by Oregon law. (See Ex 102, § XVIII at 18.10.)(App D) Under Oregon law, it is the presence or absence of ambiguity, not whether

extrinsic evidence is considered, which determines whether contract interpretation is a matter of fact or a matter of law. Whether a term is ambiguous is an issue of law, never an issue of fact. Deerfield Commodities v. Nerco, Inc., 72 Or App 305, 696 P2d 1096 (1985). In making the legal (not factual) determination whether contract language is ambiguous, courts operating under Oregon law are expressly authorized to consider extrinsic evidence. Welch v U.S. Bancorp, 286 Or 673, 690, 596 P2d 947 (1979); Card v Stirnweis, 232 Or 123, 374 P2d 472 (1962); Contra Jarrett v United States National Bank, 81 Or App 242, 725 P2d 384 (1986) (purporting to distinguish Welch and Card).

> "In construing an instrument, the circumstances under which it was made, including the situation of the subject and the parties, may be shown so that the judge is placed in the position of those whose language the judge is interpreting." ORS 42.220.

As the express references to "the judge" emphasize, consideration of these "surrounding circumstances" does not render the process of construing the contract one of fact determination. Rather, deciding whether language is ambiguous remains purely a question of law whether extrinsic evidence is or is not considered.

> "In deciding if the language of the contract is ambiguous, it is proper for the court to consider extrinsic evidence regarding the circumstances under which an agreement was made or to which it relates." Adams v. Knoth, 102 Or App 238, 244, 794 P2d 796 (1990) (decided after Jarrett and consistently with Welch and Card).

Additionally, in Sunset Coatings Co., Inc. v. Department of Trans., 62 Or App 53, 56, 660 P2d 164 (1982), the court explained:

> "*** In determining whether a contract provision is ambiguous the court may consider 'the circumstances under which it was made, including the situation of the subject and of the parties ***, so that the judge is placed in the position of those whose language he is interpreting.'"

The process both of deciding whether contract terms are ambiguous and of interpreting unambiguous terms remain purely questions of law, not questions of fact. Adams v. Knoth, 102 Or App at 243 (whether a contract is ambiguous is a question of law for the court); Deerfield Commodities v. Nerco Inc., 72 Or App at 305 (interpretation of unambiguous contract terms is an issue of law for the court). The Ninth Circuit erred in reviewing the contract interpretation as if it were a factual finding.

CONCLUSION

The Ninth Circuit erred in applying the federal "clearly erroneous" standard to the state legal issues of contract interpretation raised in this appeal. This violated both Oregon law and the practice in other federal circuits.

For the reasons stated above, the Court should issue a writ of certiorari to

the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit's decision is inconsistent with other United States courts of appeal and has so far departed from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision. White Buffalo respectfully suggests that review by certiorari and reversal is appropriate.

Respectfully submitted,
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[4] *When the extension of time for filing a petition for a writ of certiorari was sought by Luther L. Clevenger, President of White Buffalo, he was proceeding pro se. It was later determined that legal counsel would be required for the corporation.*

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use and benefit of J. ARLIE BRYANT, INC., a Washington corporation,	NO. 90-35730
Plaintiff-Appellee,	D.C. NO. CV-87-AAM 0467-AAM
v.	ORDER
WHITE BUFFALO CONSTRUCTION, INC., an Oregon corporation; TRANSAMERICA INSURANCE COMPANY, a California corporation,	
Defendant-Appellant.	

Before: WRIGHT, FARRIS and THOMPSON,

Circuit Judges.

The petition for rehearing is denied.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the use and benefit of J. ARLIE BRYANT, INC., a Washington corporation, Plaintiff-Appellee, v. WHITE BUFFALO CONSTRUCTION, INC., et al., Defendant-Appellant.	NO. 90-35730 D.C. NO. CV-87-0467-AAM MEMORANDUM*

Appeal from the United States District Court for the Eastern District of Washington Alan A. McDonald, District Judge, Presiding

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* *This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.*

Submitted June 4, 1991**

Seattle, Washington

Before: WRIGHT, FARRIS and THOMPSON, Circuit Judges.

White Buffalo Construction, Inc. ("White Buffalo") appeals the district court's judgment in favor of J. Arlie Bryant, Inc. ("Bryant") in Bryant's action under the Miller Act, 40 U.S.C. §§ 270a-270d. White Buffalo contends the district court erred in its interpretation of a subcontract agreement between White Buffalo and Bryant. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Paragraph IX(b)(1) of the subcontract agreement required Bryant to maintain liability insurance coverage of $3 million

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** *The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.*

for at least "two years after completion of the Principal Contract." Paragraph IX(b)(2), however, allowed Bryant to cancel its liability insurance coverage after "completion of the work, without written consent of contractor." Paragraph 4 of the agreement required Bryant to complete its work "in no event (unless an extension is granted to [Bryant]) later than Nov. 18, 1986." Paragraph 4 of the agreement's "Special Conditions," however, provided that Bryant "shall commence and complete his work within approximately two and one-half months."

The district court reviewed the provisions of the subcontract agreement, heard testimony, and considered the parties' exhibits. After considering this evidence, the district court concluded that the agreement unambiguously gave Bryant the right to cancel the required liability insurance when its work on the

project was completed, and that Bryant's completion of all work on the project some twelve days beyond the November 18, 1986 date was "within approximately two and one-half months" as permitted by the contract.

Because the district court relied on extrinsic evidence in interpreting the subcontract agreement, "its interpretation of the contract will not be reversed unless it is clearly erroneous." In re United States Fin. Sec. Litig., 729 F.2d 628, 632 (9th Cir.1983).

The district court's interpretation of the contract was not clearly erroneous. The evidence established that the language giving Bryant the right to cancel liability insurance coverage upon "completion of the work," and the language permitting completion of the work "within approximately two and one- half months" was added to the agreement at Bryant's

request and modified the earlier provisions pertaining to insurance coverage and the November 18, 1986 completion date. In interpreting the contract, the district court sufficiently considered all relevant evidence. The court was not required to hear evidence as to White Buffalo's unilateral understanding, nor did the court fail to consider applicable provisions of the subcontract agreement.

AFFIRMED.

APPENDIX C

JUDGMENT

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 90-35730

CT/AG#: CV-87-0467-AAM

UNITED STATES OF AMERICA, for the use and benefit of J. ARLIE BRYANT, INC., a Washington corporation

Plaintiff - Appellee

v.

WHITE BUFFALO CONSTRUCTION, INC., et al.

Defendant - Appellant

APPEAL FROM the United States District Court for the Eastern District of

Washington (Spokane) .

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the case be, and hereby is AFFIRMED, to the District Court. Cost taxed in the amount of $200.00, in favor of Appellee.

Filed and entered June 13, 1991

APPENDIX D

"18.10 The laws of the State of Oregon shall govern as to all matters arising under or relating to this agreement. Any action or arbitration hereunder shall be brought and maintained in Multnomah County, Oregon, and in either state or federal court, as appropriate; provided, however, that if the Principal Contract prescribes a different venue, then any action or arbitration hereunder may be transferred and consolidated with a proceeding brought under the Principal Contract, if permitted under applicable law."

APPENDIX E

Supreme Court of the United States

No. A-484

White Buffalo Construction Inc., et al.,

Petitioners

v.

United States

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 1st, 1992.

/s/ Sandra day O'Connor

Associate Justice of the Supreme Court of the United States

Dated this 7th day of January, 1992.

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, for the use and benefit of J. ARLEY BRYANT, INC., a Washington corporation, Plaintiff, v. WHITE BUFFALO CONSTRUCTION COMPANY and TRANSAMERICA INSURANCE COMPANY, Defendants.	No. C-87-467-AAM FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial on July 16, 1990, before the Honorable Alan A. McDonald, the plaintiff being represented by James P. Hutton and Velikanje, Moore & Shore, Inc., P.S. and by Ronald M. Somers. The defendants were represented by Richard Alexander of Stoel, Rives, Boley, Jones & Grey and Thomas Cochran and Tony Tompkins of Witherspoon, Kelley, Davenport and Toole.

The Court heard all of the

testimony offered by the parties and considered the relevant exhibit of the plaintiff numbers 1 through 24 and 26 and of the defendants numbers 101 through 190, which were admitted by stipulation of the parties (with exceptions as noted on the record), surrounding the negotiation and execution of the Subcontract Agreement between the parties (Exhibits 102 or 1A) and makes the following:

FINDINGS OF FACT

1. All findings of Fact stated by the Court in its oral decision rendered July 16, 1990, are hereby incorporated by reference into this document as Findings of Fact in this decision.

2. Defendant White Buffalo was awarded the prime contract on project YIR 1104 on July 28, 1986.

3. J. Arlie Bryant Inc. received oral notice to proceed from White Buffalo on September 2, 1986 and was at work on

the project site on September 3, 1986. Bryant agreed to crush rock for White Buffalo at a rate of $2.74 a ton and produced in accordance therewith 105,259.17 tons of material.

4. Bryant commenced crushing aggregate rock for the project on September 29, 1986 and finished crushing aggregate rock for the project on November 20, 1986. White Buffalo completed hauling and placing of the crushed aggregate rock on the project on November 20, 1986. Bryant completed source pit clean up and removal of its crushing equipment on November 28, 1986.

5. The BIA accepted 105,259.17 tons of crushed aggregate rock as within specifications of the prime contract and made full payment thereon to White Buffalo at $7.87 per ton (Exhibit Nos. 2c and 2d).

6. Bryant had liability insurance coverage of $3 million under the

Subcontract Agreement through and including Bryant's completion of the project on November 28, 1986.

7. Bryant's removal of logs from the BIA right-of-way off project YIR 1104 did not result in delay in finalizing project YIR 1104.

8. Defendant Transamerica Insurance Company, a California corporation, executed for the benefit of the plaintiff and the United States of America a bond in accordance with the provisions of Title 40 of the United States Codes § 278. J. Arlie Bryant provided timely written notification to all parties as required by 40 U.S.C. § 270(b) and stated with substantial accuracy the amount of the claim and the name of the parties to whom the labor and materials were furnished.

9. Bryant is entitled to interest on all unpaid sums from June 30, 1987 until paid. White Buffalo owed $67,495.02 from

June 30, 1987 until making a payment of $37,495.02 on October 26, 1987. Exhibit 26. Plaintiff is entitled to $30,0000.00 together with accrued interest until date of judgment.

CONCLUSIONS OF LAW

1. All Conclusions of Law stated by the Court in its oral decision rendered July 16, 1990, are hereby incorporated by reference into this document as Conclusions of Law in this decision.

2. The Court heard all testimony offered by the parties and considered all of the exhibits of the parties admitted by stipulation surrounding the negotiation, execution and/or modification of the Subcontract Agreement between the parties and determines the following issues as matters of law.

3. The Court has received and considered the parole testimony of Luther Clevenger, principal in defendant White

Buffalo Construction, Inc., cognizant of the integration clause contained in § 18.13 of Exhibit 1a. The integration clause bars the parole testimony offered. The Court concludes that the Subcontract Agreement was prepared by the defendant in the following respects:

a. Defendant inserted the language contained in § 4 of Attachment A to Exhibit 1(a) as follows:

> "Subcontractor acknowledges that contractor is unable to perform his work without an ample stockpile of the specified aggregate. Subcontractor shall immediately commence work upon receiving notice to proceed and shall work continuously and diligently until the work is completed. Subcontractor shall commence and complete his work within approximately two and one-half months."

b. Defendant inserted the language contained in § IX(b) (2) of Exhibit 1(a) as follows:

> " *** Subcontractor shall not cancel any policies or insurance required hereunder <u>until completion of the work, without written consent</u>

of Contractor. All policies shall name contractor, its officers, directors, agents and employees as additional insureds and shall contain waiver of subrogation rights against contractor and its representatives."

The specific language inserted by the defendant in the Subcontract Agreement at § 4 of Attachment A does not require the plaintiff to have finished the plaintiff's work on BIA project YIR 1104 by November 18, 1986. The Court concludes that a 10 to 12 day lag beyond November 18, 1986, in the completion of the plaintiff's work is within the meaning of the phrase "approximately two and one-half months" and that even if "approximately two and one-half months" is an ambiguous term such ambiguity must be construed against the defendant who inserted the language.

4. The Court concludes that Subcontract § IX (b) (2) clearly gives the plaintiff the right to cancel its policies

of insurance after completion of its work. The plaintiff's performance was accepted by the project owner as of November 28, 1986. The Court further concludes that even if the defendant argued that there was some ambiguity or conflict between the language of § IX(b) (1) and § IX(b) (2) that that ambiguity must be construed against the defendant who inserted the ambiguous language.

5. The court rules as a matter of law that the defendant's claims of delay damages and for payment of extended insurance premiums must by dismissed with prejudice (Exhibit 123).

6. The defendant withdrew its claim for testing costs of $247.50 plus overhead and profit and the Court concludes that that portion of the defendant's counterclaim should also be dismissed with prejudice.

7. The parties stipulated in open

court that the plaintiff would be entitled to prejudgment interest at 9% simple interest from June 30, 1987 on any unpaid amounts until the date of judgment. The Court concludes that plaintiff is entitled to such prejudgment interest.

8. The Court concludes that defendant Transamerica Insurance Company is bound for the payment of plaintiff's claims herein pursuant to 40 U.S.C. § 270 et. seq.

9. The plaintiff is entitled to judgment against the defendants, jointly and severally, in the sum of $30,000.00, plus prejudgment interest at the rate of 9% per anum on $67,495.02 from June 30, 1987, to October 26, 1987, and at the rate of 9% per annum from October 27, 1987, through July 16, 1990, for a total prejudgment interest in the sum of $9,302.32, plus plaintiff's costs and reasonable attorney's fees pursuant to §

6.5 of the Subcontract Agreement in the sum of $24,214.79 for a total judgment of $63,517.11.

10. The defendant White Buffalo Construction's counterclaims should be dismissed with prejudice.

11. The court after considering all of the evidence and the testimony adduced at trial finds generally for the plaintiff and against the defendants.

DONE IN OPEN COURT this 30 day of July, 1990

_____

Alan A. McDonald
Judge

Supreme Court, U.S.
FILED
MAR 20 1992
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(2)

No. 91-1407

In The
Supreme Court of the United States

October Term, 1991

WHITE BUFFALO CONSTRUCTION, INC., an Oregon Corporation; TRANSAMERICA INSURANCE COMPANY, a California Corporation,

Petitioners,

v.

UNITED STATES OF AMERICA, for the Use and Benefit of J. ARLIE BRYANT, INC., a Washington Corporation,

Respondent.

BRIEF OF J. ARLIE BRYANT, INC. IN OPPOSITION TO CERTIORARI PETITION

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No. 91-1407

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BRIEF OF J. ARLIE BRYANT, INC. IN OPPOSITION TO CERTIORARI PETITION

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JURISDICTION

This is a Miller Act case over which the district court had jurisdiction pursuant to 40 U.S.C. §270b. The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291. This Court has jurisdiction to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit upon timely receipt of a petition for Writ of Certiorari.[1] 28 U.S.C. §1254(1); 28 U.S.C. §2101(c); Supreme Court Rule 13.4.

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[1] *The time limits for filing a Petition for Writ of Certiorari are mandatory and jurisdictional.* Missouri v. Jenkins, *495 U.S. 33, 109 L.Ed.2d 31, 110 S.Ct. 1651, 1660 (1990). Respondent proposes that Petitioners' certiorari petition should be deemed untimely due to a misuse of the extension process.* See *Argument, Section I, supra.*

STATEMENT OF THE CASE

Respondent, J. Arlie Bryant, Inc., a Washington corporation (hereinafter "Bryant") operates a rock crushing business in the states of Oregon and Washington. Petitioner, White Buffalo Construction, Inc. (hereinafter "White Buffalo"), is a minority general contractor authorized to do business within the states of Washington and Oregon.

After extensive negotiations, Bryant and White Buffalo signed and executed a written contract for work on a road improvement project within the state of Washington. The owner of the project was the Federal Bureau of Indian Affairs.

Following completion of its subcontract work, a dispute arose between the parties over the timeliness of Bryant's performance and post-completion insurance requirements. After White Buffalo continued

to refuse payment for Bryant's subcontract work, Bryant commenced an action in the United States District Court for the Eastern District of Washington against White Buffalo and its bonding company, Transamerica Insurance Company, under the Miller Act, 40 U.S.C. §270, et seq. White Buffalo filed an answer, affirmative defense and counterclaim alleging that Bryant breached the parties' subcontract and alleging damages as a result of such breach in an amount in excess of $30,000.

On July 16, 1990, the parties appeared before the United States District Court for the Eastern District of Washington for a bench trial. During opening argument, the parties presented two primary issues to the District Court:

> (1) Whether Bryant timely completed its rock crushing work under the written subcontract

agreement; and

(2) Whether Bryant complied with the insurance provisions of the subcontract.

The district court noted, and the parties candidly admitted, that these two contractual interpretation issues were threshold legal issues which the court could determine as a matter of law.

Prior to ruling on the legal issues, the district court heard and considered a substantial amount of extrinsic evidence, including the provisions of the subcontract agreement, oral testimony and the parties' exhibits. The trial court expressly noted that it had heard all evidence that would be offered by either party regarding the explanation, modification, or interpretation of the provisions of the subcontract relating to the insurance and completion

date issues.[2] (App.1, p.1). The court also noted that it heard oral evidence in order to focus on the "circumstances under which the contract documents were formulated." (App.1, p.1). Following these introductory notes, the court then determined the threshold legal issues as a matter of law.

After considering the evidence, the district court concluded that the subcontract unambiguously gave Bryant the right to cancel the required liability insurance when its work on the project was completed, and that Bryant's completion of all work on the project was "within approximately two and one-half months" as permitted by the

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[2] *For judicial convenience, Bryant has attached as Respondent's Appendix 1 a true and correct copy of a transcript of the district court's oral decision. The court's oral decision was expressly incorporated into its written Findings of Fact and Conclusions of Law entered on July 30, 1990.*

contract. Alternatively, the court held that if the completion date and insurance provisions were ambiguous, they should be construed against White Buffalo, as drafter. Based on its rulings, the court entered a money judgment against White Buffalo, in favor of Bryant, in the amount of $63,516.11, including attorney fees.

The Court of Appeals for the Ninth Circuit affirmed the district court in an unpublished, memorandum decision which stated that the district court had considered all relevant evidence on the contract interpretation issues and that the district court's interpretation was not clearly erroneous.

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ARGUMENT

I. WHITE BUFFALO MISUSED THE EXTENSION PROCESS AND ITS PETITION SHOULD BE CONSIDERED UNTIMELY

Pursuant to 28 U.S.C. §2101(c), a Writ of Certiorari must be filed within 90 days of the entry of the judgment below, which time period may be extended by a Justice of the Supreme Court for "good cause", for a period not to exceed 60 days. See also Supreme Court Rule 13. Applications for an extension of time should be submitted 10 days before the specified final filing date and are "not favored". Supreme Court Rule 30.2; Supreme Court Rule 13.6. This Court recently has reiterated that: "This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits." Missouri v. Jenkins, 495 U.S. 33, 109 L.Ed.2d 31, 110 S.Ct. 1651, 1660 (1990).

In the present case, White Buffalo's 90-day time limit commenced on September 27, 1991, the date the Ninth Circuit denied White Buffalo's petition for a rehearing. In a letter dated December 12, 1991, White Buffalo made a *pro se* request for an extension of time to file a Petition for a Writ of Certiorari. A copy of White Buffalo's extension request is set forth in Respondent's Appendix No. 2. White Buffalo's alleged reasons for the extension were that its counsel (Stoel, Rives, Boley, Jones & Grey of Portland, Oregon) had withdrawn from representation, and White Buffalo needed additional time to prepare its pro se petition. In a January 7, 1992 order signed by Justice Sandra Day O'Connor, White Buffalo was granted an extension of time to file a Petition for Writ of Certiorari to and including February 1, 1992. After the extension was

granted, White Buffalo's *same* legal counsel, Charles F. Adams of Stoel, Rives, Boley, Jones & Grey proceeded to prepare, sign and file White Buffalo's Petition for Writ of Certiorari currently before this Court, acknowledging that White Buffalo had obtained the extension pro se but stating that "it was later determined that legal counsel would be required for the corporation." See, White Buffalo's Petition for Certiorari, page 12, fn. 3.

Questions of subjective good faith aside, White Buffalo and its counsel have misused the extension process. As this Court recently has recognized, something beyond a simple withdrawal of counsel or need for additional research time must be demonstrated by an applicant before an extension for "good cause" will be granted. See, e.g., Madden v. Texas, ____ U.S. _____, 112 L.Ed.2d 1026, 111 S.Ct. 902, 905

(1991); Kleem v. Immigration and Naturalization Service, 479 U.S. 1308, 93 L.Ed.2d 566, 107 S.Ct. 484 (1986). Based on the above-cited decisions, and absent White Buffalo's pro se application, it is extremely doubtful that "good cause" for an extension of time to file a certiorari petition could have been demon-strated. In the present case, the fortuitous withdrawal and re-entry of counsel allowed White Buffalo to obtain an extension to file a certiorari petition which otherwise would not have been granted. Such action constitutes a misuse of the extension process. Bryant submits that, for this reason, White Buffalo's Petition for Writ of Certiorari should be deemed untimely and this Court should not invoke its jurisdiction to hear this matter.

II. THERE ARE NO "SPECIAL OR IMPORTANT" REASONS JUSTIFYING REVIEW BY THE SUPREME COURT

This Court has consistently recognized the importance of denying Writs of Certiorari except in cases involving legal principles, the settlement of which have importance to the public as distinguished from that of the parties, or in cases where there is a "real and embarrassing" conflict of opinion and authority between the Circuit Courts of Appeals. See, e.g., Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614, 620 (1955) (citing, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 43 S.Ct. 422, 423, (1923)); See also Supreme Court Rule 10.1(a). Boiled down to its essence, the parties' dispute simply involves the application of state law contract

principles to interpret a private written contract.[3] There are no questions of

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[3] *Bryant agrees with White Buffalo that the parties' dispute must be resolved by application of state law contract principles, however, for different reasons. Contrary to White Buffalo's assertion in its certiorari petition, federal court jurisdiction was not based on diversity of citizenship, but was based upon application of the Miller Act, 40 U.S.C. §270b, which statute is attached as Respondent's Appendix 3. When Jurisdiction is conferred by the Miller Act and not by diversity of citizenship, state law controls the interpretation of Miller Act subcontracts to which the United States is not a party, while questions regarding substantive rights and remedies under the Miller Act remain governed by federal law. Cf., U.S. For Use Of Palmer Constr. v. Cal State Elec., 940 F.2d 1260, 1261 (9th Cir. 1991); F.D. Rich Co., Inc. v. United States Industrial Lbr. Co., 417 U.S. 116, 417 U.S. 116, 40 L.Ed.2d 703, 94 S.Ct. 2157, 2164, (1974). In addition, Bryant disagrees with White Buffalo that the law of the state of Oregon is the appropriate state law to apply. In the Ninth Circuit, White Buffalo cannot argue legal error based on Oregon contract law because of its failure to apprise the Washington District Court of Oregon law. See, Federal Sav. and Loan Ins. Corp. v. Butler, 904 F.2d 505, 509 (9th Cir. 1990).*

federal law raised by White Buffalo's certiorari petition or the merits of the parties' underlying contractual dispute. Recognizing this, the court of appeals, without oral argument, in an unpublished memorandum decision, found that the district court's resolution of the contractual interpretation issues was proper. The court of appeals' ruling has no ramifications beyond the parties' to this case, and it may not be cited to or by courts of the Ninth Circuit except in extremely limited circumstances. See, Ninth Circuit Rule 36-3. The pending certiorari petition seems to be a simple attempt by White Buffalo to avoid paying a modest money judgment based on ordinary state law contract principles. There simply are no "special and important reasons" for this Court to invoke its discretionary juris-diction under Supreme Court Rule 10.1(a).

A. The Ninth Circuit Court of Appeals' Ruling is Not Inconsistent With Decisions in Other Circuits or Applicable State Law.

The primary issue that White Buffalo proposes for review is whether state law governs the interpretation and construction of contract terms in a diversity case. White Buffalo's stated issue is overly broad and misleading. Federal court jurisdiction at the district court level was based on the Miller Act, 40 U.S.C. §270b, and not diversity of citizenship. See note 3, supra.

Bryant would stipulate that as a general, legal proposition, when a federal court interprets written contracts in a diversity or Miller Act case, the state substantive law of contracts applies. See, e.g., In Re Aslan, 909 F.2d 367, 369 (9th Cir. 1990); U.S. For Use of Palmer Constr. v. Cal State Elec., 940 F.2d 1260, 1261

(9th Cir. 1991). Therefore, on its face, White Buffalo's petition fails to present an issue of public interest worthy of review.

In the body of White Buffalo's petition, it goes on to claim that the court of appeals erred by failing to apply an Oregon state law standard of review (de novo) to the contract interpretation dispute between the parties. See White Buffalo's Petition for Certiorari, p. 7.

Contrary to White Buffalo's assertions, the Ninth Circuit's review of the contract interpretation issues in the present case is not inconsistent with the general rule that the trial court's determination of questions of law are reviewed de novo while factual findings are reviewed on a "clearly erroneous" standard. The Ninth Circuit consistently has recognized that the question of what standard of review

applies to contract matters is not always clear because the interpretation of a contract can involved mixed questions of fact and law. L.K. Comstock & Co. v. United Eng. & Constructors, 880 F.2d 219, 221 (9th Cir. 1989); In Re U.S. Fin. Securities Litigation, 729 F.2d 628, 632 (9th Cir. 1983). In its memorandum decision, the Ninth Circuit simply found that the district court reviewed a considerable amount of extrinsic evidence, including the written contract, oral testimony and the parties' exhibits, and stated:

> "Because the district court relied on extrinsic evidence in interpreting the subcontract agreement, 'its interpretation of the contract will not be reversed unless it is clearly erroneous.'" Petitioner's Appendix B at p. 4 (citing, In Re U.S. Fin. Securities Litigation, 729 F.2d 628, 632 (9th Cir. 1983)).

The bottom line is that the Ninth Circuit's review of the parties' state law contract dispute is not inconsistent with any of the federal cases cited at page 8 of White Buffalo's pending petition. Its decision is not inconsistent with Washington or for that matter Oregon state law. See, Super Valu Stores, Inc. v. C.E. Loveless, 5 Wn. App. 551, 553, 449 P.2d 368 (1971) (trial court entitled to deference when making ambiguity determination based on extrinsic evidence); Adams v. Knoth, 102 Or. App. 238, 794 P.2d 796, 799 (1990) (if language of contract is ambiguous, extrinsic evidence may be admitted as to the parties' intent, which then becomes a question of fact).

Finally, even if the standard of review used by the Ninth Circuit did conflict with other circuits, this still is not a reason for granting White Buffalo's

Writ of Certiorari. A long time ago, this Court stated that:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a Writ of Certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860, 861 (1938).

Simply stated, the Ninth Circuit's application of state law standards of review and contract interpretation principles to the dispute at hand is not a "real and embarrassing" conflict of opinion, justifying Supreme Court review. Rice, 75 S.Ct. at 620.

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B. The Court of Appeals' Decision Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

White Buffalo also contends that the Ninth Circuit overlooked findings that were "unquestionably and irrefutably erroneous." White Buffalo's Petition for Certiorari, p. 7. Specifically, White Buffalo claims that it was not the drafter of insurance provisions in the parties' written contract. Even if true, Supreme Court Rule 10 implies and case law confirms that overlooked facts are an insufficient reason to justify review. United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496, 497 (1925). An erroneous factual determination made by the lower courts in this simple contract dispute does not involve any principles, the settlement of which have importance to the public.

CONCLUSION

For the foregoing reasons, White Buffalo's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

Velikanje, Moore & Shore, Inc., P.S.

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THE COURT: The court has by invitation heard the evidence which would be offered by either side, the explanation, modification or interpretation of the provisions of the contract as they relate to the issues in this case. It did so with a feeling that those might furnish direction for the resolution of issues and that in so doing narrow the issues and save to the party's litigant a substantial expenditure of time and money in the trial of this case. The Court against proceeded with the assumption that usually those issues are threshold and properly so, and prove again to be so in this case. The focus of our attention then is to our circumstances under which the contract documents were formulated.

The Court must say at the outset that the contract form which apparently the Defendant's principal procured from the attorney and is candid about getting it for a form which he intended to tailor to meet the needs of each occasion as they might arise, and it contains, the form itself contains what lawyers refer to as a merger

provision, an integration clause at Section 18.13 which indicates it's a final and entire agreement of parties, supersedes all prior contemporaneous, oral or written communications between the parties, that there are no promises, terms, conditions or obligations other than those contained herein. And it going on to say that the contract shall not be modified in any way except in writing signed by the party to which the modification is inserted.

Now, we are told that the special conditions, Attachment A, were arrived at by and between the parties after the Plaintiff's principal declined to sign the subcontract in the form presented in the August meeting. There is no question but that those were drafted by the Defendant and that he was the author of the language which was inserted as those special conditions, and likewise was the draftsman of the language contained under roman number No. 9 of page 9 of the document which has been read into the record which on its face gave the subcontractor, in this case the Plaintiff, the right to cancel the policies it required under the contract upon completion of the work.

Now, the Court in the interpretation of these agreements is constrained to rules which are familiar again to lawyers, they are basic in contract law, a six credit course taught in the first year of law school, they abound across the land, and the wisdom has been proven over the commercial centuries.

And the first is that where a merger provision is contained, as this one is, that parole testimony is not admissible to vary what is otherwise the clear provisions of the contract.

Dealing further, another tenant of contract law provides that the specific governs the general and the latest is to be given priority in its temporal presentation. The Court might also add that it has on occasion appended to those people who say that a lawyer who represents himself has a fool for a client. The Court is fond of pointing out that he's still a lot better off as a layperson who engages in doing his own legal work with the notion that he's going to accomplish economy, and usually it works decidedly to the contrary and certainly will in this case.

Here is a provision for which the

Court has been asked to accept as a requirement that the crushing will be completed sometime in October. The Court doesn't want or need to get into those factual disagreements because here's the language, and the Court quotes, subcontractor acknowledges that contractor is unable to perform his work without an ample stockpile of the specified aggregate. Subcontractor shall immediately commence work upon receiving notice to proceed and show work continuously and diligently until work is completed. Subcontractor shall commence and complete his work within approximately two and one half months.

Now, first of all it is contended that from the language that an ample stockpile is recognized as a necessity for the contractor to perform, that there is somehow an obligation placed upon this Plaintiff with regard thereto. If it is, it isn't defined. There's nothing in the contract that says what is to occur if it isn't maintained. There is not the usual provision for liquidated damages that a lawyer would have provided against that contingency except for the recognition that he is unable to perform it without an ample

stockpile.

And it goes on to say and then, the concluding paragraph after that statement is that the subcontractor shall commence and complete his work within approximately two and a half months. Now, in this case we're talking about a variation of 10 or 12 days in a two and a half month period. This Court would hold, if required to do so, that a 10 or 12 day lag in a two and a half month period is within the meaning of the word approximate. In all of the contingencies that can occur in a crushing contract in the mountains with the winter approaching is the scenario against which it's based that doesn't seem to the Court an unreasonable construction at all. But if that cannot be said, if the contract is ambiguous in that respect, it's got to be construed against the person who drafted it, and in that case that is the Defendant's principal. He chose the language, he's the one who undertook a definition in the manner indicated, and if approximately doesn't include a 10 or 12 day delay, the Court certainly feels that it would, if it doesn't, he has failed to provide us with any better identification,

and the Court feels that on that basis the language should be construed against the draftsman in favor of the person against whom it's sought to be imposed.

And the Court is, of course, made comfortable in this respect because there is no showing of any real damage of any kind to this Defendant in that regard. There is some hint that if he would have finished sooner, that is if the Plaintiff had finished sooner, that the whole matter might have been finished sooner, but if the Court had to reach that point on an evidentiary basis, it would be hard-pressed to accept the level of proof that is offered in evidence of this. Is Court is not resolving it on that basis, but as a matter of law.

Now, turning to the contract provision, paragraph 9, roman numeral 9, on page 9 in the critical section that's contained in b-2 in the second paragraph of that subparagraph. There is in b-1 a requirement for the furnishing of general liability including contractors liability, contingent liability, and so on, and all on a occurrence basis extended for at least two years after the completion of principal

contract with the limits at least on a combined basis of $3,000,000. The parties interpret that, at least the Defendants certainly interpret it to require maintaining insurance in force for a period of two years after completion of the principal contract. The Court questions that interpretation, that's just a matter of academic interest, and wonders if it's simply a requirement that the contractor for the insurance or the insurance contract as provided in accordance with the requirements of that section, that it covers occurrences, that is events rising within two years after completion of the contract. But that's really not important to the Court's resolution of it and accepting the parties argument about what it means.

The special condition placed in the second paragraph of 2, under B, clearly gives to the subcontractor the right to cancel the policy on its own volition upon completion of the work.

Now, there isn't any argument in this case that the work for all intents and purposes was completed by the 28th of November. The Court attaches nothing of

significance to the removal of the trees, but even if it did, performance of this subcontractor was accepted by the owner at the end of November, and thereafter he canceled the insurance above $1,000,000 that he carried. Now, maybe that wasn't what was meant to be said here, maybe the Defendant didn't really mean to give him that option, really he could have believed that the problem related to the difficulty in obtaining insurance or the problems with changing companies, that isn't what it says. It says that upon completion of the work without anybody's consent he can cancel the policy.

Now, that again is argued would conflict with b-1, maybe it does. If it does, against it's ambiguous, and again the ambiguity would be construed against the draftsman and in favor of the person against whom that provision is sought to be enforced. Again, it is a specific provision which prevails over the general provision that is in the printed form of the contract, and other contract law again is entitled to precedents in its meaning.

And so on those grounds and for those reasons the Court holds as a matter

of law that the damages claimed with regard to the delay which resulted by the fact that the contract took until the 28th of November to finish are not recoverable and likewise the cost, if the Defendant incurred any, of the acquiring additional insurance for the Plaintiff is not recoverable.

December 12, 1991

The Honorable Sandra Day O'Connor
Supreme Court of the United States
U.S. Supreme Court Building
1 First Street N.E.
Washington D.C. 20543

Dear Justice O'Connor:

Our petition for rehearing case number 90-35730 was denied by the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on September 27, 1991. We would like to have the judgment issued by the Ninth Circuit that affirmed the decision of the United States District Court for the Eastern District of Washington, No. CV-87-0467-AAM reviewed.

I am requesting an extension of time to file our petition for writ of certiorari. I am requesting this extension because I will be proceeding with this case on a pro se basis due to the fact the my former counsel has withdrawn. I am not schooled in the art of the law. I require additional time to become familiar with the

procedures and the requirements to file my petition for writ of certiorari.

I have enclosed copies of the order denying rehearing and the decision of the Ninth Circuit. I have sent a copy of this letter to both opposing counsel.

Respectfully,

Luther L. Clevenger

pc: Ronald M. Somers
Thomas D. Cochran

RESPONDENT'S APPENDIX NO. 3

§270b. Same; rights of persons furnishing labor or materials. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act [40 USCS §§270a et seq.] and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, that any person having direct contractual relationship with a subcontractor but no contractual relationship expressed or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the

date on which such persons did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the Untied States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was

supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(Aug. 24, 1935, c. 642, § 2, 49 Stat. 794; Aug. 4, 1959, P.L. 86-135, § 1, 73 Stat. 270).